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Supreme Court, U.S.
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No. ①

In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

CHARLES E. MINES, JR.
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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This is a capital case.

QUESTION PRESENTED

With but one exception, this Court has consistently determined that jury charge error is mere trial error. Moreover, the question whether of *Penry*[1] error can be amenable to a harmless-error analysis has not been squarely answered by this Court. *See Smith v. Texas*, 127 S. Ct. 1686, 1699 (2007) ("*Smith II*") (Souter, J., concurring). The lower court, however, has determined that *Penry* error — jury-charge error — is structural error. *Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006) (*en banc*), *cert. denied*, 127 S. Ct. 2974 (2007). But this Court has expressly held that a finding of constitutional error does not end the inquiry. Mindful of the principles underlying habeas review and the high costs of retrial, this Court has instructed that a harm analysis must follow. *Calderon v. Coleman*, 525 U.S. 141, 503-04 (1998) (per curiam). *See also Yates v. Evatts*, 500 U.S. 391, 402 (1991); *Rose v. Clark*, 478 U.S. 570, 586 (1986). In the instant case, the lower court, bound by its earlier — and incorrect — holding in *Nelson*, refused to consider whether the *Penry* error was harmless.

The lower court's decision gives rise to an important question:

> The court below held in *Nelson*, that *Penry* error is structural and not subject to a harmless-error analysis. Did the court of appeals erroneously refuse to consider

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[1] *Penry v. Lynaugh*, 492 U.S. 302 (1989)("*Penry I*").

whether Mines was actually harmed by any error that occurred at sentencing?

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OPINION BELOW

The court of appeals reversed the district court's denial of habeas corpus relief and remanded with instructions to grant the writ on February 26, 2008. I PA I: 12 (*Mines v. Quarterman*, No. 03-11137, 2008 U.S. App. LEXIS 4251 (5th Cir. 2008)(unpublished)).[2]

JURISDICTION

The Director's petition for writ of certiorari is timely filed on or before May 27, 2008.[3] Sup. Ct. R. 13.3 (West 2008). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

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[2] "PA" refers to the appendix to the instant petition for certiorari review, preceded by the volume number and followed by relevant page numbers. "Tr" refers the to transcript, the clerk's record of pleadings and documents filed in the trial court. "SF" refers to the "Statement of Facts," the reporter's record of transcribed trial proceedings. "SX" and "DX" refer to the State's exhibits and the defense exhibits, respectively, admitted into evidence during the trial. "SHTr" refers to the record of pleadings and documents filed during the state habeas proceedings.

[3] Ninety days from February 26, 2008 is May 26, 2008, which this year is a federal holiday. Under Supreme Court Rule 30, the filing is due the next day.

STATEMENT OF THE CASE

I. Facts of the Crime

On May 27, 1988, eighty-year-old Vivian Moreno was found dead on the bedroom floor of her home. 9 SF 29, 67-69. Alongside Vivian lay her critically injured, fifty-seven-year-old invalid daughter, Frances Moreno. 9 SF 29, 67-69, 143. Vivian's autopsy revealed that she died as a result of multiple, blunt-impact wounds to the head and extremities. 9 SF 117-18. These wounds were consistent with blows from a hammer found at the scene and blood on the hammer matched Vivian's blood. 9 SF 119, 127. Three days after the murder, Mines was arrested at a campsite in a wooded area approximately seventy-five yards behind the Moreno home. 9 SF 46-51, 73. Several items at the campsite were identified as coming from the Moreno home. 9 SF 32, 34-35, 38, 46-49. On June 2nd, a fingerprint found beneath the Morenos' closet window was positively identified as belonging to Mines. 9 SF 75, 134. After waiving his *Miranda*[4] rights, Mines confessed to police. 9 SF 76-83.

At trial, the contested issue was Mines's sanity at the time of the offense. Chief among the evidence presented by the defense was the fact that Mines was previously arrested in Ellis County for robbery in September of 1987, and he remained incarcerated until May 19, 1988, when the robbery charges against him were dismissed, and he was sent to Terrell State Hospital. 9 SF 80-81. The defense presented extensive testimony from Dr. Ricardo Schack, a psychiatrist. 9 SR 150. Schack was appointed by the trial court in the

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[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

spring of 1988 to examine Mines. 9 SF 155-56. Schack's first visit with Mines was April 13, 1988, at the Ellis County Jail, at which time Mines was very agitated, verbally abusive, and experiencing delusions of grandeur. 9 SF 157, 165-66. Schack conducted his assessment of Mines in the jail because the jailers recommended Mines not be removed from his cell because he was agitated. 9 SF 156. Schack met with Mines again in December of 1988 and, overall, met with him five or six times during which time Mines became less agitated but his behavior did not change significantly. 9 SF 156-57. On his last few visits, Schack attempted to converse with Mines but found it very difficult, as talking to him was like "a constant argument." 9 SF 167-68. During the spring and winter time periods, Schack believed Mines was "mentally impaired" and diagnosed him as suffering from manic depressive illness, also known as bipolar disorder. 9 SF 9 SF 161. In Schack's opinion, on the commission date of the offense, Mines was insane, *i.e.*, he was incapable of knowing his behavior was wrong. 9 SF 169-71.

In rebuttal, the State presented testimony from two psychiatrists. The first was Dr. James Grigson who specialized in forensic or legal psychiatry. 9 SF 202-03. Grigson, too, was appointed by the court to examine Mines. 9 SF 206. Grigson stated he attempted to examine Mines at the Ellis County Jail on November 15, 1988, but he refused the examination after Grigson advised him of his rights, so this jail visit lasted five minutes "at the most." 9 SF 206-07. In March of 1989, Grigson only observed Mines for approximately thirty to ninety minutes, as again Mines would not converse with him. 9 SF 207-08. Based on these two observations and his review of Mines's hospital records, Grigson concluded

Mines was "not suffering from a serious, severe mental disease or defect that would prevent him from knowing the difference between right and wrong[,]" and he saw no signs or symptoms indicating [Mines] was suffering from bipolar disorder. 9 SF 208. Grigson elaborated that he had observed persons with bipolar disorder, and stated that they are generally severely depressed or suicidal but do not engage in criminal behavior. 9 SF 209-10.

The second State's psychiatrist to testify was Dr. Quynh Nguyen, who is one of three psychiatrists at Terrell State hospital. 9 SF 218. Nguyen conducted the initial evaluation of Mines when he was brought to the hospital on May 19, 1988, pursuant to a protective custody order. 221-22. During an initial examination, Nguyen evaluates the client's behavior, mood, affect, rate of speech, and thought content. 9 SF 225-26. Nguyen stated Mines very ably described the circumstances which led to his commitment and discussed the presidential candidates, was coherent but talked "around," and denied having any suicidal or homicidal ideas or a history of mental illness or drug abuse. 9 SF 226-27. Nguyen also physically examined Mines, and found no evidence of medical illness or organic dysfunction which would cause physical or mental impairment. 9 SF 233-34. Each member of the treatment "team[5]" also evaluated Mines and determined he was not mentally ill and therefore did not recommend he be committed to the hospital. 9 SF 235-36. The diagnostic consensus of the treatment team was that Mines "had a mixed personality disorder with paranoia, passive aggressive, antisocial features." 9 SF 237-38.

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[5] The team consisted of a psychologist, a nurse, a social worker, and a rehabilitation coordinator. 9 SF 224.

Nguyen stated that a personality disorder was not the same as a mental disease or defect, with the difference being that a person with a personality disorder is able to know right from wrong, make his own judgments, and is responsible for his own actions. 9 SF 238.

II. The Punishment Trial

A. The evidence admitted

During the punishment phase of trial, the State introduced into evidence copies of Mines's "pen packets," listing a series of violent offenses for which Mines had been convicted in North Carolina and Virginia. 9 SF 277-79. Specifically, the evidence showed that Mines had prior convictions for felonious assault and unlawful wounding in Virginia, as well as convictions for assault by pointing a gun, communicating threats, and felonious breaking or entering in North Carolina. SX 38, 39. The State then recalled Dr. Grigson, who testified as to Mines's sanity during the guilt-innocence phase, and posed a hypothetical question whether a person in Mines's circumstances – that is, a person with the six convictions described in the pen packets, carrying a diagnosis of antisocial personality, and having committed the instant offense – would probably commit continuing acts of violence that would constitute a threat to society. 9 SF 281-82. Dr. Grigson stated that in his opinion such a person "will commit future acts of violence and does represent a total threat to society." 9 SF 282.

In response, Mines recalled Dr. Schack, who testified that proper treatment for bipolar disorder would reduce the odds that Mines would commit future acts of violence. 9 SF 286-87.

B. The jury charge

Pursuant to state law, Mines's jury was charged with answering two special issue questions:

> Was the conduct of the defendant, Charles E. Mines, Jr. AKA Charles Anderson, that caused the death of the deceased, Vivian Moreno, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Is there a probability that the defendant, Charles E. Mines, Jr. AKA Charles Anderson, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> Was the conduct of the defendant, Charles E. Mines, Jr. AKA Charles Anderson, in killing Vivian Moreno, the deceased, unreasonable in response to the provocation, if any, by the deceased?

Tr 114-15; *see* Tex. Code Crim. Proc. Ann. Art. 37.071. The trial court also gave the following instruction:

> You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to

> determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to the Special Issues hereby submitted to you.

Tr 114.

III. Direct Appeal and Postconviction Proceedings

Mines's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals, which affirmed on October 14, 1992, and denied rehearing on March 17, 1993. I PA II (*Mines v. State* (*Mines I*), 852 S.W.2d 941 (Tex. Crim. App. 1992)). This Court subsequently granted Mines's petition for writ of certiorari, vacated the opinion of the Court of Criminal Appeals, and remanded the case for further consideration in light of *Johnson v. Texas,* 509 U.S. 350 (1993). I PA III (*Mines v. Texas,* 510 U.S. 802 (1993)). On remand, the Court of Criminal Appeals again affirmed Mines's conviction and sentence. I PA IV (*Mines v. State (Mines II),* 888 S.W.2d 816 (Tex. Crim. App. 1994)). Mines then filed a second petition for writ of certiorari, which this Court denied. *Mines v. Texas,* 514 U.S. 1117 (1995).

Mines filed a state application for writ of habeas corpus with the trial court. SHTr at Exhibit A. The trial court recommended that Mines's application be denied. SHTr 118. The Court of Criminal Appeals subsequently ordered that the case be filed and set for submission, and ordered briefing on the issue of whether a death-sentenced inmate must be competent to assist his

counsel in filing an application for habeas corpus relief. SHTr at Order of Oct. 8, 1997. Ultimately, however, the Texas court issued a published opinion denying habeas corpus relief. II PA V (*Ex parte Mines,* 26 S.W.3d 910 (Tex. Crim. App. 2000)). Mines's petition for writ of certiorari was denied by this Court. *Mines v. Texas,* 532 U.S. 908 (2001).

Mines filed his original federal habeas petition with the court below on December 21, 2000, and filed an amended petition on April 20, 2001. 1 R 69; 3 R 669. The lower court rejected Mines's claims and denied habeas relief, first in a Magistrate's Report and Recommendation, then in the district court's order adopting the report. II PA VI (*Mines v. Cockrell,* No. 3:00-CV-2044-H (Findings, Conclusions, and Recommendation of the U.S. Magistrate Judge, May 21, 2003)); II PA VII (*Mines v. Cockrell,* No. 3:00-CV-2044-H, Order (Aug. 6, 2003)); II PA VIII (*Mines v. Cockrell,* No. 3:00-CV-2044-H, Judgment (Aug. 6, 2003)); *see also* 4 R 1141-91, 1245-46. The district court also denied a certificate of appealability. III PA IX (*Mines v. Cockrell,* No. 3:00-CV-2044-H, Certificate As to Appealabilty (Nov. 7, 2003)). Mines then requested a certificate of appealability to the Fifth Circuit Court of Appeals. The Fifth Circuit granted his request in part and denied in part. III PA X: 175 (*Mines v. Dretke,* 118 Fed. Appx. 806 (5th Cir. Dec. 16, 2004)). In the intervening years, the law surrounding the issues in Mines's case continued to develop until the appellate court finally granted partial relief. I PA I: 12.

REASONS FOR GRANTING THE WRIT

Constitutional error is not, and should not be, taken lightly. Even more so in the context of a death-penalty case. But this Court has never shied away from allowing harmless-error analysis in those cases, even where as here, the flaw in the instructions can be construed as creating a reasonable likelihood that the jury was precluded from considering and giving effect to the defendant's mitigating evidence.

Penry error occurs when the jury is unable to give meaningful effect to certain types of mitigating evidence; thus, the death sentence would not necessarily reflect the jury's "reasoned moral response." But underlying this "moral response" is nothing more than the jury's determination that, at the end of the day, the mitigating evidence did not outweigh the aggravating evidence. Yet it is highly unlikely that a jury would have found Mines's weak evidence of mental illness so sympathy-provoking as to overcome the horrific murder and attempted murder he committed. And requiring an expensive and difficult –if not impossible– retrial two decades later is fundamentally at odds with the traditional role of habeas corpus review.

In the instant case, the lower court concluded the jury was prevented from considering and giving effect to Mines's mitigating evidence of mental illness. Then bound by the holding of *Nelson* — and in clear contravention of this Court's precedents — it made no determination of harm. But as the record fairly shows, in this case, the constitutional error did not have a "substantial and injurious effect or influence" on the verdict.

I. The Precedent of this Court Makes Clear That *Penry* Error Is Not Structural Error, Thus the Inquiry Does Not End upon the Determination That There Was a Reasonable Likelihood That the Jury Was Precluded from Considering and Giving Effect to the Defendant's Mitigating Evidence.

A. With only the exception of defective reasonable-doubt instructions, this Court has unequivocally held jury-charge error to be trial error.

It has long been settled that "trial error" is that which has "occurred during the presentation of the case to the jury, and . . . may therefore be qualitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." *Arizona v. Fulminante*, 499 U.S. 279, 207-08 (1991). The *Fulminante* Court recognized that "most constitutional errors can be harmless." *Id.* at 306. *See also United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (2006). And as the Court explained in *Neder v. United States*, "'[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.'" 527 U.S. 1, 8 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)), *see also id.* at 9.

Structural defects, on the other hand, are different and exceedingly rare. With such errors, "[t]he entire conduct of the trial from beginning to end is . . . affected." *Fulminante*, 499 U.S. at 309-10. In this way, then,

structural defects "'defy analysis by "harmless-error" standards' because they "affec[t] the framework within which the trial proceeds," and are not 'simply an error in the trial process itself.'" *Gonzalez-Lopez*, 126 S. Ct. at 2564 (quoting *Fulminante*, 499 U.S. at 309-10) (alterations in original). Indeed, the Court has only found structural error in six discrete instances. *See Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of counsel); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand-jury selection); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction). 4As the Court concluded in *Rose*:

> Placed in context, the erroneous . . . instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction . . . [because] the error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced [the defendant] thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence. Consequently, there is no inherent difficulty in evaluating whether the error prejudiced respondent in this case.

478 U.S. at 579-80 & n.7 (citations omitted).

Consistent with these principles, most jury-charge errors have been held to be trial errors subject to harmless-error analysis. *See Washington v. Recuencco*, 126 S. Ct. 2546 (2006) (failure to submit sentencing factor to jury); *Mitchell v. Esparaza*, 540 U.S. 12 (2003) (per curiam) (instruction omitted element of offense); *Neder* (instruction omitted element of offense); *Calderon v. Coleman*, 525 U.S. 141 (1998) (misleading jury instruction); *Clemmons v. Mississippi*, 494 U.S. 738 (1990) (state court invalidated aggravating factor as a matter of state law after the verdict); *Carella v. California*, 491 U.S. 263, 266 (1989) (erroneous conclusive presumption in jury instruction); *Pope v. Illinois*, 481 U.S. 497, 501-04 (1987) (jury instruction contained wrong constitutional standard); *Rose* (instruction improperly shifted burden of proof on element of crime). *But see Sullivan* (improper definition of "beyond a reasonable doubt" nullifies verdict and results in structural error).

Mines's jury was charged according to state law at the time of his trial: the special issues asked the jury to consider his future dangerousness and the deliberateness of his actions. Additionally, Mines's jury, having been empaneled shortly after *Penry I* was decided, was given the supplemental instruction later found to be an inadequate remedy in *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*"). This is classic jury-charge error. *See Smith II*, 127 S. Ct. at 1699 (Alito, J., dissenting) ("The federal constitutional error that occurred in the penalty phase of petitioner's trial and that was identified in *Smith v. Texas*, 543 U.S. 37 [] (2004) (per curiam) [], concerned a flaw in the jury instructions[.]"). As such, it is properly classified as trial error.

B. That *Penry* error arises in the context of death penalty case does not transform such garden-variety trial error into structural error.

This Court's Eighth Amendment jurisprudence demands that a capital sentencing jury not be precluded from considering, as a mitigating factor, the character and record of the individual offender, as well as the circumstances of the particular offense. This ensures that the jurors will be able to give their "reasoned moral response" to the defendant's mitigating evidence. *E.g.*, *Penry II*, 532 U.S. 782; *Penry I*, 492 U.S. 302; *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality op.). In Texas, when the jury is so precluded, this gives rise to *Penry* error. But the Court has not hesitated to find these types of jury-instruction problems amenable to harmless-error analysis. The lower court, on the other hand, has carved a new exception out of whole cloth: "moral judgements" are not subject to harmless-error review. *Nelson*, 472 F.3d at 314-15 & n.8.

In a major departure from this Court's general rule that jury-charge error is trial error, even where the death penalty has been imposed, the court below suggests that *Penry* error should be structural error. *Id.* *Nelson* relied principally on the absence of any harm analysis — and the lack of any suggestion that harm analysis might be appropriate — from the *Penry* line of cases. *Id.* at 314 (citing *Tennard v. Dretke*, 542 U.S. 274 (2004)); *Penry II*, 532 U.S. 782; *Penry I*, 492 U.S. 302). This absence, the court explained rests on

> the recognition that *Penry* error deprives the jury of a "vehicle for expressing its 'reasoned *moral* response' to the defendant's background, character and crime,'" which precludes it from making "'a reliable determination that death is the appropriate sentence.'" *Penry II*, 532 U.S. at 797 [] (quoting *Penry I*, 492 U.S. at 328 []) (internal quotation marks omitted) (emphasis added). This reasoned *moral* judgment that a jury must make in determining whether death is the appropriate sentence differs from those fact-bound judgments made in response to the special issues.

Id. at 314-15 (emphasis in original).

As an initial matter, the absence of something does not make the opposite true. That aside, in deciding as it did, the lower court wholly ignored that the "reasoned moral response" is nothing more than a factual determination that, in the minds of the jurors, the defendant's mitigating evidence did not overcome whatever aggravating factors were at play, including but not limited to, the facts of the crime and the defendant's prior criminal history. Especially instructive is this Court's determination that *Hitchcock*[6] error can be harmless. *See Singletary v. Smith*, 507 U.S. 1048 (1993) (granting certiorari and remanding to appellate court in light of recent opinion in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

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[6] *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

At issue in *Hitchcock* was a Florida statute limiting the mitigating circumstances a jury or judge could consider to only those enumerated. 481 U.S. at 395-96. While defense counsel argued to the jury that "it was to 'look to the over picture . . . consider everything together . . . consider the whole picture, the whole ball of wax," the prosecutor insisted that the jury was to "consider the mitigating circumstances and consider those by number.'" *Id.* at 398 (internal citations omitted). Further, the trial judge instructed the jurors that they were to consider only those aggravating and mitigating circumstances as allowed for by state law. *Id.* This violated the Eighth Amendment:

> We think it could not be clearer that the advisory jury was not instructed to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U.S. 1 [] (1986), *Eddings v. Oklahoma*, 455 U.S. 104 [], and *Lockett v. Ohio*, 438 U.S. 586 [].

Id. at 398-99. No meaningful difference exists between the law invalidated in *Hitchcock* and the Texas special issues found to be inadequate in *Penry I*, *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007), and *Brewer*.

C. The conclusion that the jury instructions created a reasonable likelihood of misapplication does not end the inquiry.

When a claim involves jury instructions in capital-sentencing proceedings, the relevant inquiry is whether there is a reasonable likelihood the jury applied them in such a way that precluded consideration of the defendant's mitigating evidence. *Boyde v. California*, 494 U.S. 370, 380 (1990); *see also Abdul-Kabir*, 127 S. Ct. at 1673-674; *Smith II*, 127 S. Ct. at 1698; *Estelle v. McGuire*, 502 U.S. 62, 72 & n. 4 (1991); *Nelson*, 472 F.3d at 311. But as *Calderon* explained, even where a *Boyde* analysis has been made, a federal habeas court must go one step further:

> Although the *Boyde* test for constitutional error, like the *Brecht* harmless-error test, furthers the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation," 494 U.S. at 380 [], it is not a substitute for the *Brecht* harmless-error test. The *Boyde* analysis does not inquire into the actual effect of the trial error on the jury's verdict; it merely asks whether constitutional error has occurred.

525 U.S. 146-47.

This Court has been very clear when concluding constitutional error required automatic reversal. *See, e.g., Gonzalez-Lopez*, 126 S. Ct. at 2564 ("[E]rroneous deprivation of the right to counsel of choice, . . . qualifies as 'structural error.'"); *Sullivan*, 508 U.S. at 281-82

(denial of trial by jury due to a defective reasonable doubt instruction "unquestionably qualifies as structural error"); *Vasquez*, 474 U.S. 263-64 ("[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review."). But with respect to *Penry* error, no such suggestion, much less a plain statement, has ever been made despite numerous opportunities to do so. For good reason: because *Penry* error, like all other trial errors, should not require automatic reversal and is thus subject to harmless-error analysis.

II. Even If There Is *Penry* Error in this Case, the Record Does Not Support a Finding That the Error Had a "Substantial and Injurious Effect or Influence" on the Verdict.

Brecht mandates that the standard of review for harm should be "whether the error 'had a substantial and injurious effect or influence in determining the jury's verdict.'" 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). *See also Fry v. Pliler*, 127 S. Ct. 2321 (2007). This means that "a harmlessness finding requires 'fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" *Id.* at 2330. (Stevens, J., concurring in part and dissenting in part) (quoting *Kotteakos*, 328 U.S. at 765). The policies underlying *Brecht*'s harmless-error standard are "the State's interest in the finality of convictions," comity, and federalism during collateral review. 507 U.S. at 635. Granting relief without any evidence of actual harm violates the role of habeas corpus review: traditionally a vehicle to grant relief to those whom society has

'grievously wronged.'" *Id.* at 637. Yet, Mines has not been "grievously wronged."

The lower court's grant of relief to Mines is based on weak and incredible evidence which the panel below was foreclosed from considering based on the en banc Court's decision in *Nelson*. In fact, two juries had previously dismissed Mines's evidence of mental incapacity in both his competency hearing and during the guilt-innocence stage of trial. Although it is undoubtedly true that the jury was not able to fully consider Mines's mental illness, it does not logically follow that if the jury had that opportunity it would have spared his life. Indeed, every indication from the jury was that it did not find Mines's evidence credible or persuasive. Refusing to consider the likely actions of the jury in determining whether relief is warranted is contrary to this Court's body of law.

Further the decision to grant relief in a twenty-year-old case has significant costs. It remains to be seen whether the State can effectively retry Mines's punishment case yet again. Certainly, the societal costs of this case, particularly in the administration of justice, weigh heavily in favor of considering harm. Notably, a cost-benefit analysis is part of any analysis under *Teague v. Lane*, 488 U.S. 289 (1989). And this Court has found that the costs of retroactive application generally, and almost certainly will outweigh the benefits. *See Sawyer v. Smith*, 497 U.S. 227, 242-43 (1990); *see also McKlesky v. Zant*, 499 U.S. 467, 490 (1991) (observing that when a habeas petitioner is granted a new trial, the "erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal

adjudication." (citation omitted)). In this context, habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Duckworth v. Egan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring). Therefore, the interests of justice — finality, comity, and federalism — strongly favor consideration of whether any *Penry* error had a "substantial and injurious effect or influence" on the verdict."[7] *Id.*

In the instant case, there is no doubt the instructions given to the jury were problematic under both *Penry I* and *Penry II*. But the state courts did not recognize the constitutional error, much less apply any sort of harm analysis. The *Fry* Court explained it is nevertheless the duty of the federal habeas court to conduct a harm analysis. 127 S. Ct. at 2328. Even so, the lower court did not conduct a harm analysis because whether such is applicable where there is *Penry* error has not been decided by this Court. It is nevertheless appropriate for this Court to consider whether the *Penry* error in this case was harmless. *See Yates v. Evatts*, 500 U.S. 391, 407 (1991) ("[W]e have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance.") (citation omitted); *Rose*, 478 U.S. at 407 ("[W]e 'plainly have the authority' to decide whether, on the facts of a particular case, a constitutional error is harmless under the

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[7] Importantly, the *Nelson* court did not even pay lip service to the concerns and principles on which the harmless-error analysis relies. 472 F.3d at 314-15; *see also id.* at 331-37 (Dennis, J., concurring and assigning additional reasons).

Chapman [*v. California*, 386 U.S. 18 (1967)] standard.") (citing *United States v. Hastings*, 461 U.S. 499, 510 (1983)).

In considering whether *Penry* error occurred under the former Texas sentencing issues, this Court has placed special emphasis on the fact that Texas juries are aware of the consequences of their actions and are thus "likely to weigh mitigating evidence as it formulates these answers in a manner similar to the one employed by capital juries in 'pure balancing states.'" *Johnson*, 509 U.S. at 370-71 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 182 n.12 (1988) (plurality op.)). Mines's jury was likewise aware, as it was instructed that an affirmative answer to both special issues would result in the imposition of the death penalty and a negative answer to one would result in a life sentence.

The responsibility assigned to jurors in a capital murder trial is serious. We cannot assume they do not take it seriously. The *Lockett* Court presumed that "'jurors . . . confronted with the awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision.'" 438 U.S. at 598 (quoting *McGautha v. California*, 402 U.S. 183, 208 (1971)). Nothing in the record suggests the jury in this case acted in a contrary manner. And ultimately, even taking into account the flawed special issue questions and the inadequate supplemental instruction, nothing in the record suggests that the death sentence imposed reflects something less than the jury's "reasoned moral response." The Eighth Amendment was thus not offended.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

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